



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
VALPARAISO UNIVERSITY SCHOOL OF LAW**

CRIMINAL LAW

Was there sufficient evidence to convict the defendant for reckless homicide and failure to stop after an accident resulting in death?

Was the defendant's sentence proper?

***Benton
Barber
v. State
of
Indiana***

**Appeal
from:**
Marion
Superior Court

The Honorable
Patricia
Gifford, Judge

**Oral
Argument:**
March 23,
2007
11:00 a.m. –
12:00 noon CT
30 minutes
each side

CASE SYNOPSIS

**Facts and Procedural
History**

On March 21, 2004, seventeen-year-old Lindsey Thompson was driving south on I-465 in Indianapolis with a passenger, fifteen-year-old Kevin Gregg. Thompson was driving in excess of the speed limit of 55 miles per hour and drove up behind the car of Benton Barber. Barber was traveling in the far right southbound lane of I-465 at the posted speed limit. Barber was with his wife and son. As Thompson approached him from behind, Barber “slammed” on his brakes. Thompson then passed Barber in the middle lane.

As Thompson passed Barber's vehicle, Gregg gave Barber “the finger.” Thompson pulled her vehicle back in front of Barber's in the far right lane. Barber then moved into the middle lane and accelerated until he was next to Thompson's vehicle, at which point he gave Thompson and Gregg “the finger” and began “weaving” his car toward Thompson's. Barber

then pulled ahead of Thompson in the far right lane and hit his brakes. As Thompson began to move her vehicle to the left toward the middle lane, Barber “swerve[d]” to the left and came within “a couple feet” of Thompson's vehicle. As Thompson moved to avoid Barber, she lost control of her vehicle, crossed the median, and crashed head-on into another vehicle. The collision occurred just north of the 56th Street exit off of I-465. Thompson and Gregg both died as a result of the collision.

After witnessing the collision, Barber accelerated to speeds in excess of 90 miles per hour and weaved in and out of traffic. Two other drivers who witnessed the incident followed Barber from the scene and recorded his license plate number. Barber exited I-465 at 38th Street. One of the witnesses followed Barber onto 38th Street and into a McDonald's parking lot. The witness told Barber that he had to return to the scene of the accident, and Barber responded that he “didn't have anything to do with that.” Eventually, Barber promised to return to the scene, but he then

*Benton Barber v. State of Indiana***Case Synopsis (continued)**

drove past the on-ramp and went home. As soon as he arrived home, Barber called police and reported the collision.

The State charged Barber with two counts of reckless homicide, a Class C felony, and one count of failure to stop after an accident resulting in death, a Class C felony. During the bench trial held in the cause, Barber testified that he intended to return to the scene of the collision but that the traffic on the interstate “was so far backed up that I couldn’t get back on it.” The trial court found Barber guilty on all three counts. In sentencing Barber, the trial court imposed the maximum sentence of eight years for each count. The court ordered the sentences for the two counts of reckless homicide to be served consecutively with the sentence for failure to stop after an accident resulting in death to be served concurrently. Of the total sentence of sixteen years, the trial court suspended eight years, resulting in a total executed sentence of eight years to be followed by four years of probation.

Parties’ Arguments

On appeal, Barber raises five issues: (1) whether there is sufficient evidence to support his convictions for reckless homicide; (2) whether there is sufficient evidence to support his conviction for failure to stop after an accident resulting in death; (3) whether the trial court abused its discretion in sentencing Barber; (4) whether Barber’s sentence is inappropriate in light of the nature of his offenses and his charac-

ter; and (5) whether the trial court violated Indiana Code § 35-50-2-1.3 in sentencing Barber. For purposes of this oral argument, we have asked the attorneys to focus on two issues in particular: (1) whether there is sufficient evidence to support his convictions for reckless homicide and (2) whether the trial court violated Indiana Code § 35-50-2-1.3 in sentencing Barber. (See page 3.)

Regarding his convictions for reckless homicide, Barber contends that his actions were “immature and stupid but not criminal.” More specifically, Barber notes that he did not leave his lane of traffic and asserts that he did not violate any traffic laws. The State responds that the evidence is sufficient to support a finding that Barber “drove his car in an unreasonable manner in conscious and unjustifiable disregard of the harm that might result.” Indiana Code § 35-41-2-2(c) provides, “A person engages in conduct ‘recklessly’ if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.”

Barber also challenges his sentence on appeal. One aspect of his challenge is that the trial court erred in ordering his sentences for the two counts of reckless homicide to run consecutively, i.e., back-to-back. Reckless homicide is a Class C felony. In Indiana, the minimum sentence for a Class C felony is two years, the maximum sentence is eight years, and the advisory

Case Synopsis (continued)

sentence is four years. Here, the trial court imposed the maximum sentence of eight years for each of Barber's reckless homicide convictions and ordered them to run consecutively. Barber argues that in doing so, the trial court violated Indiana Code § 35-50-2-1.3 (c), which provides:

(c) In imposing:

(1) *consecutive sentences in accordance with IC 35-50-1-2;*

(2) an additional fixed term to an habitual offender under section 8 of this chapter; or

(3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

(Emphasis added). Citing this statute, Barber argues that if the trial court wanted to impose consecutive sentences for Barber's two convictions for reckless homicide, it should have imposed the advisory sentence, i.e., four years, for each individual conviction, rather than the maximum term of eight years for each conviction. There is currently a split in authority on the Indiana Court of Appeals regarding the impact of Indiana Code § 35-50-2-1.3(c). See *Robertson v. State*, 860 N.E.2d 621 (Ind. Ct. App. 2007) and *White v. State*, 849 N.E.2d 735 (Ind. Ct. App. 2006).

Opinion in this case expected:

By summer 2007

The Court will notify Professor Carter when the opinion is handed down. Please check the Court's website to read the opinion.

Court of Appeals opinions are available online at <http://www.in.gov/judiciary/opinions/appeals.html>.

Locate archived opinions at <http://www.in.gov/judiciary/opinions/archapp.html>

For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>

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TODAY'S PANEL OF JUDGES

Hon. Nancy H. Vaidik (Porter County), Presiding

- Judge of the Court of Appeals since January 2000

Nancy H. Vaidik was appointed to the Court by Governor Frank O'Bannon on January 19, 2000. She grew up in Portage, Indiana, and graduated from Valparaiso University with High Distinction in 1977 and from Valparaiso University School of Law in 1980.

Prior to her elevation to the appellate court, Judge Vaidik served as a trial court judge in Porter County for seven years. She began her legal career with the Porter County Prosecutor's Office, achieving the status of chief deputy prosecutor before joining the law firm of J.J. Stankiewicz and Associates.

Judge Vaidik is a former adjunct professor of law at Valparaiso University School of Law and is currently an adjunct professor of law at Indiana University School of Law in Bloomington. She teaches for the National Institute for Trial Advocacy and the College of Law of England and Wales. She is the former president of the Indiana Judge's Association and has received numerous awards, including the Indiana Domestic Violence Coalition Judge of the Year and the Paragon of Justice award from the BLSA and HLSA chapters at Valparaiso University School of Law.

Judge Vaidik, who was retained on the Court by election in 2002, is married and has two daughters.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began just prior to the Court's centennial in 2001.

Today's oral argument is the 179th case the Court of Appeals has heard "on the road" since early 2000.

Among the sites for traveling oral arguments are law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Michael P. Barnes (St. Joseph County)

- Judge of the Court of Appeals since May 2000

Michael P. Barnes was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon on May 22, 2000. Judge Barnes received his B.A. from St. Ambrose College in Davenport, Iowa in 1970 and his J.D. from the University of Notre Dame Law School in 1973.

Judge Barnes was a Deputy Prosecuting Attorney and privately practiced law in South Bend from 1973 to 1978. In 1978 he was elected the St. Joseph County Prosecuting Attorney, a position he held for 20 years. During that tenure, Judge Barnes was elected President of the National District Attorneys Association (1995-1996), Chairman of the Board, Indiana Prosecuting Attorneys Council (1982-1983, 1992-1993), President of the St. Joseph County Bar

Association (1992-1993), National Board of Trial Advocacy (1995-1996), National Advisory Council on Violence Against Women (1997), Chairman of the Board of Regents, National College of District Attorneys (1997-1998), American Prosecutor's Research Institute (1997-1998), and various other professional and civic organizations.

Judge Barnes is a member of the Indiana Bar Foundation, the St. Joseph County Bar Association, and serves on the Board of Directors of the Friends of the St. Joseph County Juvenile Justice Center.

Judge Barnes was retained on the Court of Appeals by election in 2002. He is married and the father of two sons.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.

TODAY'S PANEL OF JUDGES

Hon. Terry A. Crone (St. Joseph County)

- Judge of the Court of Appeals since March 2004

Terry A. Crone was appointed to the Court of Appeals March 8, 2004, and currently serves as the Presiding Judge of the Third District. Judge Crone was raised in South Bend. He graduated *cum laude* from DePauw University in 1974 and from Notre Dame Law School in 1977. Judge Crone practiced law for nine years, concentrating in areas of civil practice, and served as the St. Joseph County Attorney from 1981 to 1986. In 1986, Judge Crone was appointed Magistrate of the St. Joseph Circuit Court, where he served until his appointment as Judge of the St. Joseph Circuit Court in 1989.

Judge Crone is a past President of the St. Joseph County Bar Association and a former member of the Board of Managers of the Indiana Judges Association, the Supreme Court Committee on Character and Fitness, and the Alternative Dispute Resolution Committee of the Indiana Judicial Conference.

Judge Crone is currently a member of the St. Joseph County, Indianapolis, Marion County, Indiana State and American Bar Associations, the American Judicature Society, and the Phi Delta Phi Honorary Legal Society.

Judge Crone is a frequent speaker at legal education programs and currently serves as Moderator of the Indianapolis Bar Association Bar Leader Series. He helped found a program in South Bend to familiarize minority high school students with the law and related fields and was a founding member of the South Bend Commission on the Status of African-American Males and the St. Joseph County Coalition Against Drugs.

Judge Crone, who was retained on the Court by election in 2006, is married and has three daughters.

ATTORNEYS FOR THE PARTIES

For Appellant, Benton Barber
Ruth Johnson
Marion County Public Defender Agency
Indianapolis

Originally from Elgin, Illinois, **Ruth Johnson** has worked as a public defender with the Marion County Public Defender Agency, Appellate Division, since October of 2004. Ms. Johnson worked for twelve years as a Deputy State Public Defender representing clients in post-conviction relief proceedings. In between the State Public Defender and the Marion County Public Defender, Ms. Johnson spent six months as a deputy prosecuting attorney in Brown County, Indiana, handling child support cases.

Ms. Johnson is an artist, and along with her husband she participates in art fairs and festivals through out the Midwest, including the ever popular Valparaiso Popcorn Festival.

Ms. Johnson is a graduate of the Indiana University School of Law at Indianapolis and received her undergraduate degrees from Indiana University in Bloomington.

AMICUS BRIEFS

A person who is not a party to a lawsuit may file a brief of amicus curiae, with permission of the Court, if he or she has a strong interest in the subject matter.

- There are no amicus briefs in this case.

ATTORNEYS FOR THE PARTIES

For Appellee, State of Indiana:
Cynthia Ploughe
Deputy Attorney General
Indianapolis

Cynthia Ploughe is a native of Tipton County who originally had no intention of attending college. After graduating from Tipton High School, she moved to Washington, D.C. to work for the Federal Bureau of Investigation, which trained her to be a fingerprint examiner. Four years later, she returned to Indiana, and after encouragement from a family friend, she began her collegiate studies at Indiana University in Kokomo. She eventually transferred to Ball State University, earning a bachelor's degree in 1986 with a major in political science and a minor in journalism.

Following graduation, Ms. Ploughe entered Indiana University Law School in Indianapolis and began working at the Office of the Attorney General at the end of her first year. In 1990, after graduating from law school and passing the Indiana bar exam, she was sworn in as a Deputy Attorney General. She conducted research and responded to briefs submitted by defendants in cases such as murder, child molestation, and theft. She regularly presented

cases in oral argument before the Indiana Supreme Court and the Indiana Court of Appeals.

In 1997, she left the Attorney General's office to become a deputy prosecutor in Marion County. She first prosecuted misdemeanor crimes — minor drug possession, operating a vehicle while intoxicated, prostitution, shoplifting — but soon began prosecuting felony offenses, including major drug cases, such as dealing cocaine and methamphetamine.

Ms. Ploughe returned to the Indiana Attorney General's office in 2001 and became Section Chief of Criminal Appeals in 2004. She supervises more than a dozen attorneys and acts as an appellate liaison for Indiana's 90 elected prosecutors and their deputies. Prosecutors who obtain a trial court ruling they don't like confer with Ms. Ploughe to determine whether the State will appeal. If a case is appealed, Ms. Ploughe compiles the case record and prepares the Brief of Appellant.